This Order has been prepared and filed by the Court.

FILED
OCT 22 2012
BRIAN R. MARTINOTTI
J.S.C.

IN RE NUVARING® LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3081-09 CIVIL ACTION **ORDER**

THIS MATTER having been opened to the Court upon the Defendants Organon USA Inc., Organon Pharmaceuticals USA Inc., and Organon International Inc.'s (hereinafter "Defendants") Motion to Maintain Under Seal Certain Documents Included With Defendants' Kemp Motions; the Court having considered the moving papers, opposition thereto, and Defendants' reply; and good cause having been shown;

For the reasons set forth in the accompanying Opinion;

IT IS on this 22nd day of October 2012,

ORDERED:

1. Defendants' Motions to Maintain Under Seal Certain Documents Included With Defendants' Kemp Motions is hereby DENIED;

2. A copy of this Order shall be served upon all counsel of record within five (5) days of receipt and will also be posted to the Judiciary Website.

BRIAN R. MARTINOTTI, J.S.C.

NOT TO BE PUBLISHED WITHOUT

THE APPROVAL OF THE COMMITTEE ON OPINION

IN RE NUVARING® LITIGATION	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-3081-09 CIVIL ACTION

Submitted: October 3, 2012*
Decided: October 22, 2012

On the Briefs:
For Plaintiffs: Shelly A. Leonard, Esq., Jason T. Brown, Steven Bennett Blau, *pro hac vice* (Blau, Brown & Leonard, LLC)
For Defendants: Melissa A. Geist, Esq., Daniel K. Winters, Esq. (Reed Smith, LLP)

MARTINOTTI, J.S.C.

Before this court is Defendants' ("Organon") Motion to Maintain Under Seal Certain Documents Included With Defendants' Kemp[1] Motions. This motion was opposed by Plaintiffs.

* At the September 27, 2012 case management conference, this court indicated, unless counsel requested oral argument, or the court had any questions, the motion would be decided on the briefs.

[1] On or about July 25 and July 30, 2012, Organon filed six motions to exclude testimony – three motions sought to exclude certain generic testimony offered by the Plaintiffs' experts, and three motions sought to exclude the testimony of Drs. Shelley Ann Tischkau, Kishore Udipi, and Suzanne Parisian (collectively, the

BACKGROUND

On July 23, 2009, the parties in this litigation agreed, in a Consent Order entered by the Honorable Jonathon N. Harris, J.S.C., to abide by the Protective Order ("Protective Order") entered by the Honorable Rodney Sippel, U.S.D.J. on October 15, 2008, in the MDL proceeding. (Geist Cert., Ex. A.) In entering into the Protective Order, the parties acknowledged their intent to protect "confidential, proprietary or private information protected from disclosure under federal and state law" that would be produced during the course of the litigation. (Id. at ¶ I.2.) The Protective Order defined "[c]onfidential information" to include materials that "would disclose the [supplying] party's financial information, private competitive information, trade secrets, confidential scientific information, personal or medical information or other kinds of sensitive information which the party deems confidential." (Id. ¶ II.7.) The Protective Order also states, "The use of Confidential Information during any trial in this proceeding will be addressed in a later agreement between the parties, or, if they cannot reach agreement, by further order of the Court." (Id. ¶ IX.34.) Consistent with the terms of this Protective Order and without objection from the other side, both parties periodically filed documents under seal with this court throughout the course of litigation.

On July 25 and July 30, 2012, pursuant to the parties' Stipulation and Consent Order Regarding Filing of Motions Under Seal entered on July 24, 2012 ("Consent

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"Kemp motions"). All six motions included documents which Organon filed under seal. Since then, Organon filed nine summary judgment motions on the bellwether cases: Anntrinette Wilson-Johnson (L-0597-10); Erika Medina (L-2680-09); Frank Mariconda (L-2692-09); Debra Kippola (L-2705-09); Tiffany Barrow (L-2707-09); Sharamonda Fields (L-2793-09); Febbie Ziwange (L-2829-09); Dana Namack (L-2831-09); and Robert Bozicev (L-2869-09). Each summary judgment motion also contains documents which have been filed under seal.

Order"), Organon filed the Kemp Motions.[2] Organon's Kemp Motions contained a discussion of both parties' relevant expert reports and expert depositions, which they included as exhibits to the motions and designated as confidential pursuant to the Protective Order.[3]

ORGANON'S ARGUMENT

Organon argues that documents and exhibits attached to the Kemp Motions should be kept under seal for the following reasons: First, Organon states that keeping the documents under seal is consistent with the terms of the Protective Order, noting that the justification for implementing the Protective Order continues to support maintaining the documents under seal. Second, Organon seeks only to seal "internal company documents" and documents containing "discussion of propriety, trade secret or otherwise confidential information." Organon includes Plaintiffs' experts' reports in this category because such opinions and reports were based on information allegedly disclosed pursuant to the Protective Order. Finally, Organon seeks to maintain documents under seal with the hope that the Kemp Motions are ruled in its favor, thus finding Plaintiffs' experts unqualified or their testimony inadmissible. The unsealing of the record, Organon argues, would potentially release to the public information that is inadmissible in the litigation yet damaging to Organon's reputation. A list of the documents Organon seeks to maintain under seal is attached as Appendix A to Organon's Motion.

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[2] See supra note 1.

[3] In Organon's motion to maintain certain documents under seal, Organon provides examples of exhibits which they marked confidential in the Kemp Motions: (1) Dr. Udipi's expert report as attached to Defendants' motion to exclude his testimony; (2) the report prepared by Defendants' expert, Robert Langer, Sc.D. Defendants assert that neither of these documents is publicly available, and both reports were prepared after the experts were given access to Defendants' confidential information. (Def. Mot. 4.)

PLAINTIFFS' ARGUMENT

Plaintiffs argue that the documents and exhibits should not be sealed for the following reasons: First, Plaintiffs assert that the common law presumption of public access to the courts and judicial proceedings demand that the record be unsealed and publicly accessible. Second, Plaintiffs argue that Organon has not met its burden in rebutting the presumption, requiring a showing of good cause for the record to be sealed and a showing that the party's interest in secrecy outweighs the public's need for access to judicial proceedings, particularly in cases involving health and safety. Third, Plaintiffs argue that the terms of the Protective Order do not override the presumptive right to access records. Finally, Plaintiffs note that public interest weighs against sealing in cases involving public health and safety, regardless of the outcome of the Kemp Motions that triggered the current motion and regardless of the effects on Organon's reputation.[4]

ORGANON'S REPLY

Organon replied, again asserting that the justification for the Protective Order still remains and therefore this motion should be granted. Organon also asserts that unsealing the documents will cause harm to Organon, particularly because some documents may ultimately be found inadmissible, and Plaintiff is allegedly trying to unseal the documents to intentionally harm Organon.

As required by the Consent Order, the parties met and conferred but did not reach agreement on whether certain documents included with Organon's Kemp Motions could

[4] Plaintiffs additionally made a fifth argument, stating, "The presumption in favor of public access applies to motions filed in civil court proceedings." This argument is an extension of the first and will be discussed together.

remain under seal.[5] Accordingly, Organon now moves the court pursuant to N.J. Ct. R. 1:38-1.

DECISION

This court is mindful that on September 5, 2012, Judge Sippel entered the following order:

> IT IS HEREBY ORDERED that Defendants' motions to file Daubert motions under seal . . . are GRANTED in part. The Clerk of the Court shall unseal only Plaintiffs and Defendants Daubert motions and memorandums in support . . . . The exhibits to these motions shall remain under seal pending further review.
>
> IT IS FURTHER ORDERED that Plaintiffs' motion to strike Defendants' memorandums in further support of Defendants' motions to file documents under seal . . . is DENIED.

If this motion is denied, the practical effect will be an abrogation of Judge Sippel's order; the Plaintiffs could publish in New Jersey what they could not publish in the MDL. This court is a proponent of state and federal cooperation in the MCL[6] and MDL, respectively. This is essential to avoid inconsistent rulings and provides a more efficient method to case manage matters venued between the state and the federal court;[7] however, this court cannot ignore the public policy of this state and rules promulgated by the Supreme Court for the sake of consistency with either federal or other state courts.

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[5] The court is aware that, even if the parties agree to a protective order, the scriptures of R. 1:38 must still be adhered to.

[6] Effective September 4, 2012, the New Jersey Supreme Court approved an amendment to Rule 4:38A that removes the "mass tort" term altogether. These cases are now referred to as "multicounty litigation(s)", or "MCL".

[7] See this Court's decision regarding the relationship between state MCL courts and federal MDL courts in the opinion dated October 18, 2011, from In re DePuy ASR™ Hip Implants Litigation, BER-L-3971-11, available at http://www.judiciary.state.nj.us/mass-tort/depuy/mdl-protocol-l3971-11.pdf.

Where such an inconsistency occurs, the public policy of a jurisdiction must take precedence.

In New Jersey, there is a presumption that the public has a right of access to judicial proceedings, established both in common law and by the First Amendment, which includes the public's right to inspect judicial records. Lederman v. Prudential Life Ins. Co. of Am., Inc., 385 N.J. Super. 307, 315-16, 897 A.2d 362 (App. Div. 2006). See Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066 (common law), 1070 (first amendment) (3d Cir. 1984); Hammock v. Hoffmann-LaRoche, 142 N.J. 356, 371, 662 A.2d 546 (1995). This presumption applies to all non-discovery pretrial motions and filings. Lederman, supra, 385 N.J. Super. at 316; Hammock, supra, 142 N.J. at 379. Significantly, the disposition of the underlying motion is irrelevant when determining whether the presumption applies. Lederman, supra, 385 N.J. Super. at 317.

However, this presumptive right is not absolute. Id. at 316; Hammock, supra, 142 N.J. at 375-76. "[T]o determine when the presumption of access may be rebutted," the court must find "good cause" to seal any documents, and should be guided by a reasonableness standard. Hammock, supra, 142 N.J. at 376, 380; Comment 3 to R. 1:2-1 ("This rule requires a good-cause finding to support the sealing of records. 'Good cause' for sealing records is defined by R. 1:38-11."). Good cause exists when: "(1) Disclosure will likely cause a clearly defined and serious injury to any person or entity; and (2) The person's or entity's interest in privacy substantially outweighs the presumption that all court and administrative records are open for public inspection . . . . " R. 1:38-11(b).

In other words, the party seeking to overcome the presumption must "demonstrate[] that they will suffer 'a clearly defined and serious injury' if . . . the

documents are opened to public scrutiny." Lederman, supra, 385 N.J. Super. at 323 (citing Publicker, supra, 733 F.2d at 1071). See R. 1:38-11(b)(1). Additionally, the party must "show that the interest in secrecy outweighs the presumption." Hammock, supra, 142 N.J. at 375-76 (quoting Leucadia, Inc. v. Applied Extrusion Tech. Inc., 998 F.2d 157, 165 (1993)) (internal quotations omitted). See R. 1:38-11(b)(2); Lederman, supra, 385 N.J. Super. at 323.

The party seeking to overcome the presumption of access has the burden of proving good cause – in other words, a need for secrecy – by a preponderance of the evidence. R. 1:38-11(a); Lederman, supra, 385 N.J. Super. at 317; Hammock, supra, 142 N.J. at 375-76 (citing Leucadia, Inc. v. Applied Extrusion Tech. Inc., 998 F.2d 157, 165 (1993)) (internal quotations omitted). This burden is met only by demonstrating, with specificity, a need for secrecy as to each document. Lederman, supra (citing Hammock, supra, 142 N.J. at 381-82). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." Id. (quoting Hammock, supra, 142 N.J. at 381-82) (internal quotations omitted). Where a protective order was previously implemented, the moving party cannot rely on that fact in proving good cause; instead, the party must prove why the record must currently be sealed and public access denied. Id. (citing Hammock, supra, 142 N.J. at 382).

The decision of whether to seal any records is within the court's discretion, so long as the court is "guided by the good cause standard[, which] . . . 'recognizes a very strong presumption in favor of public access.' " Id. (quoting Hammock, supra, 142 N.J. at 386)). Courts look to the following factors in determining whether a party has established "good cause" for sealing the record:

> 1) [T]he nature of the lawsuit; the substantive law likely to be applied in resolving the issues in the pleadings; 3) the kind of evidence to be introduced at trial and the likelihood it may be obtained through discovery; 4) whether trade secrets, research or other confidential information about non-parties is sought; 6) whether the material is privileged; 7) whether the material relates to matters not in dispute; 8) whether the party seeking the material already possesses it; and 9) the burden and expense to the parties seeking the protective order.

Rosenberg v. Becton, 2010 N.J. Super. Unpub. LEXIS 1204, at *7 (App. Div. June 2, 2010) (citing Catalpa Inv. Group, Inc. v. Franklin Twp. Zoning Bd. of Adjust., 254 N.J. Super. 270, 273-74, 603 A.2d 178 (Law Div. 1991)); see also Hammock, supra, 142 N.J. at 380-82.

In balancing such factors, courts note that "there is a profound public interest when matters of health, safety and consumer fraud are involved." Hammock, supra, 142 N.J. at 379. See Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787-88 (3d Cir. 1994); Lederman, supra, 385 N.J. Super. at 322; Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (1995). Cf. Rosenberg, supra, 2010 N.J. Super. Unpub. LEXIS 1204, at *9-10 (finding good cause to seal the record, in part because it was not a products liability case and therefore the public had a lesser interest in the case). "[T]here must be careful scrutiny prior to sealing records and documents filed with a court in a high public-interest case." Lederman, supra (quoting Hammock, supra) (internal quotation marks omitted).

Cases involving prescription drugs involve both health and safety and are therefore considered high public-interest cases requiring careful scrutiny prior to being sealed. Hammock, supra, 142 N.J. at 379. In Hammock, a pharmaceutical manufacturer products liability case and New Jersey's seminal case on this issue with respect to

sealing, the Supreme Court "adopt[ed] a broad standing rule affording the public access to court files when health, safety and consumer fraud are involved," Hammock, supra, 142 N.J. at 379, ultimately finding that there was insufficient evidence to support a finding of good cause to overcome the presumption of access. Hammock, supra, 142 N.J. at 386 (remanding the case to the lower court for redetermination consistent with the standard set forth by the Supreme Court).

The plaintiff in Hammock initiated a products liability claim, alleging that the warnings to physicians were inadequate, against the manufacturer of the prescription drug Accutane, a drug manufactured and distributed after it received FDA approval, and obtained by the plaintiff through her dermatologist. Id. at 361-62. Defendant-manufacturer resisted discovery, claiming that the documents sought by the plaintiff "contained trade secrets and confidential and proprietary information," that some of the information would be used for filing New Drug Applications (NDA) with the FDA, and that such documents were not publicly available. Id. at 362. Consequently, defendant moved for a protective order to seal such documents, and the court found good cause existed. Id. Defendant subsequently filed two summary judgment motions, and "counsel for [both] parties utilized documents placed under seal in support of, and in opposition to, those motions." Id. at 363. There was also no dispute that the parties used many of the documents for various other motions and briefs filed with the court. Id. Parties submitted documents with the understanding that the documents were still subject to the protective order. Id.

Prior to the disposition of the summary judgment motions, two motions to intervene were filed seeking that the documents be unsealed. Id. at 364. The first was

filed by and granted to plaintiffs in other Accutane lawsuits, requiring that these plaintiffs also be bound by the protective order. Id. The other motion was made by a public interest group seeking to petition the FDA for stricter regulation of Accutane, and the group therefore wanted public access to the records in order to obtain more evidence of the drug's alleged dangers. Id.

The latter motion was the subject of the Hammock decision. The Court set forth the presumptive right of access to courts and adopted the "good cause" standard for determining when the presumption may be rebutted to seal court records. Id. at 371, 376. The Court established factors for determining good cause and noted that specificity as to each document was required to justify such a decision. Id. at 380-82. The Court ultimately found that the record did not support a finding of good cause to seal the record. Id. at 386. Because Accutane was a prescription drug and therefore involved public health and safety, the Court noted that the public had a high interest in the case. Id. at 379. Consequently, the defendant's need for secrecy did not outweigh the public's presumptive right to access. Id. at 379, 383. Additionally, with respect to documents that the trial court felt should be sealed, the Court found that the trial court did not adequately justify its decision that the need to keep such information under seal outweighed the presumption of the right to access. Id. at 385. Finally, although the Court acknowledged that "trade secrets" constituted a "good cause" to maintain documents under seal, it found that the trial court's method of classifying documents did not adequately separate documents containing trade secrets from those containing "proprietary interests," for which it is more difficult to justify the sealing of documents. Id. at 383-84 (providing Cola-Cola's recipe as the best example of a trade secret because only two people in the

company know the recipe and they are not even allowed to fly on the same plane). Thus, the Court found that the record did not support a finding of good cause and the decision was reversed. Id. at 383, 386.

Similarly, in this motion, Organon seeks to maintain certain documents under seal that were protected by the party's Protective Order but were submitted to and filed with the court as part of nondiscovery motions, specifically, the Kemp Motions. The strong presumptive right of public access to courts applies in this case and to these documents because the documents have been filed as part of nondiscovery motions. See Lederman, supra, 385 N.J. Super. at 316; Hammock, supra, 142 N.J. at 379. The burden of overcoming the presumption rests with the moving party who seeks to keep the documents sealed – in this case, Organon. See R. 1:38-11(a); Lederman, supra, 385 N.J. Super. at 317; Hammock, supra, 142 N.J. at 375-76. Organon's argument relies on the terms of the protective order; the assertion that the documents contain proprietary, trade secret, or confidential information; and that disclosure of the documents may prejudice Organon, particularly based on the potential disposition of the underlying Kemp Motions. The court finds that Organon has not met its burden of proving good cause to seal any documents by a preponderance of the evidence.

This burden is met only by demonstrating, with specificity, a need for secrecy as to each document. Lederman, supra, 385 N.J. Super. at 317 (citing Hammock, supra, 142 N.J. at 381-82). Organon's "[b]road allegations of harm . . . are insufficient." Id.; Hammock, supra, 142 N.J. at 381-82. With respect to the Protective Order, Organon concedes that "entry of the Protective Order alone is not ground to maintain the requested documents under seal" but merely alleges that "the nature of the documents . . . – which

contain discussion of confidential business information – has not changed since Organon first designated them confidential . . . ." (Def.'s Mot. 6 n.3.) This allegation, raised in both Organon's motion and reply, is too broad to establish that "public access to the documents should be denied *currently*." Lederman, supra, 385 N.J. Super. at 317.

The court acknowledges that Organon attached, as Appendix A of its motion, a list of documents that it seeks to maintain under seal, but finds that this list does not meet the specificity requirement needed to justify good cause. Appendix A lists entire documents and a short description of each (for example, "Dr. Parisian's Report re NuvaRing®"), but does not indicate whether each document contains trade secrets, proprietary information, or some other type of confidential information. Organon did not demonstrate that a need for secrecy exists with respect to each document. See Lederman, supra, 385 N.J. Super. at 317; Hammock, supra, 142 N.J. at 381-82. Organon merely alleged that the documents that it requests to remain under seal "contain confidential information, including proprietary information about the NuvaRing® design and manufacturing process, non-public information about scientific testing done on NuvaRing® and other drugs, trade secrets, business information and misleading, inflammatory accusations against Defendants – all of which, if made public, could cause significant commercial harm to Defendants." (Def.'s Mot. 8.) Again, this allegation is too broad where courts have stated that specific examples and articulated reasoning should be stated with respect to each document. Lederman, supra, 385 N.J. Super. at 317; Hammock, supra, 142 N.J. at 381-82.

Again, Hammock is instructive on this matter; although the trial court attempted to classify the documents, the classification was not specific enough. Hammock, supra,

142 N.J. at 383-84. Even in cases cited by Organon, in which motions to keep documents under seal were granted, the court still noted and identified the movant's specificity. In Bracco Diagnostics, Inc. v. Amersham Health Inc., Civ. A. No. 03-6025, 2007 WL 2085350 (D.N.J. July 18, 2007), the court repeatedly stated, each time it found that certain information should remain under seal, that the movant "made an adequate showing . . . to rebut the presumption of public access to [that] portion of the [documents.]" Id. at *5. The court was able to find so because the movant divided the documents into categories and "specifically identified the pages and lines of the [documents] that it assert[ed] should be sealed." Id. at *4. Organon has not identified the documents in the same way or explained why particular portions should be sealed.

Finally, Organon's argument that the disclosure of the documents may be harmful to its reputation or may never be disclosed depending on the disposition of the underlying Kemp Motions is of no moment. The strong presumption of the right to access "applies regardless of the disposition of the [underlying] motion." Lederman, supra, 385 N.J. Super. at 317. Further, harm to Organon's reputation is irrelevant:

> We agree that plaintiff's allegations may embarrass defendants. . . . Nevertheless, harm to the parties' reputations does not, in a case such as this, justify sealing the record. No more embarrassment would be suffered by the parties here than would a wrongfully accused defendant in a criminal case, or a professional in a malpractice action where the charges were ultimately found to be without merit. ***If embarrassment were the yard stick, sealing court records would be the rule, not the exception.***

Lederman, supra, 385 N.J. Super. at 320 (citing R.M. v. Supreme Ct. of N.J., 185 N.J. 208, 216, 227, 883 A.2d 369 (2005)) (emphasis added).

Accordingly, this court finds that Organon has not met its burden in proving that good cause exists to maintain the requested documents under seal.

For the reasons set forth above, Organon's motion is DENIED.